No. 14831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a Corporation,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

REPLY BRIEF FOR THE APPELLANT.

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TABLE OF AUTHORITIES CITED

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1. Apparently taxpayer agrees (Br. 8) that the determination as to whether the movements in this case constitute transportation of persons does not depend upon whether or not its employees were picked up and discharged at the same point. Instead, taxpayer contends that these flights do not constitute transportation because (Br. 8-9) its employees did not have any destination as such, and because there were other purposes in having its employees flown to certain localities. Essentially, therefore, taxpayer is contending that, notwithstanding the fact that its employees were carried to certain areas by Mantz,

such movements should not be considered transportation because its employees went aloft to photograph scenes or to search for locations. We submit that such contentions lack merit.

Although taxpayer may have chartered airplanes from Mantz in order to enable its employees to perform these other functions, this cannot negate the fact that one of taxpayer's prime purposes in chartering these airplanes was to have its employees carried from the place where they were picked up to other localities in order to enable them to perform these other functions. Furthermore, in most instances, Mantz was not concerned as to what activities taxpayer's employees intended to carry on in the airplanes during these flights; instead, Mantz' concern was directed to carrying these employees to areas selected by them.

The lack of merit in taxpayer's contentions also may be illustrated by the fact that if its employees had been driven by bus or limousine to the locality where scenes were to be photographed or where locations were to be explored, or were flown to such points by Mantz and the flights terminated at such places, after which the employees were carried aloft to photograph scenes, etc., there would be no question but that the limousine or bus trip or the flights to and from these localities would constitute transportation. Consequently, it would appear that the same result should apply where these employees were taken to the areas desired by them and permitted to photograph scenes or search for locations without any interruption in their flights. In both of these instances it is clear that the movement of taxpayer's employees was both necessary and intended in order to carry out these other functions,

and, in this respect, taxpayer's employees had a place to go. The alleged fact that these other purposes of aerial photography and air searching could be accomplished only in the carrier, *i. e.,* while the person is being transported, is immaterial and should not prevent the carriage from constituting transportation.

2. We do not have any quarrel with the taxpayer's assumption (Br. 5) that the meaning of the term "transportation" should be determined in accordance with its ordinary meaning and common usage. However, we do urge that the taxpayer, as well as the court below, has erred in failing to consider the many court decisions, which hold that the term's ordinary meaning and common usage covers a carriage from place to place, irrespective of the purpose of the movement, and which encompass the movements involved in this case. In particular, we urge that the District Court erred when it ignored the decisions arising under Part II of the Interstate Commerce Act (Motor Carrier Act, 1935, c. 498, 49 Stat. 543), and the Civil Aeronautics Act of 1938, c. 601, 52 Stat. 973, and analogous statutes, which regulate movements similar to those involved in this case.* Since the term "transportation" had already acquired a well-established meaning in these prior enacted statutes, it would appear reasonable to assume that, by using terminology in Section 3469 of the

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*It also may not be remiss to point out that none of these cases support taxpayer's contention that the carriage of persons does not constitute transportation because the persons being carried intended to accomplish additional results while undergoing the flight. See *Aplin v. United States,* 41 F. 2d 495 (C. A. 9th), where this Court held a person who engaged in illicit relations with a woman before their departure from a state, during the course of their trip and after its termination, was engaged in transporting the woman under the Mann Act.

1939 Code similar to that which it previously had employed in regulating similar movements of persons, Congress intended to subject to tax movements similar to those which previously had been held to constitute transportation of persons. (See Govt's. Br. 11-12.) These movements constituting the transportation of persons by air, rail or motor vehicle, which are subject to regulation by the Civil Aeronautics Board and the Interstate Commerce Commission, are more nearly like the movements involved in this case than, as we shall point out, *infra,* movements of property, or the transportation by pipeline of natural gas or petroleum products. (See taxpayer's Br. 5.)

On the other hand, taxpayer's contention (Br. 5-6) that cases arising under Section 3475 of the 1939 Code, dealing with transportation of property, should be of guidance in the resolution of cases involving the transportation of persons, is inapposite, since there are great differences between the transportation of property and of persons which limit the applicability of the decisions arising under the property provision. (Govt. Br. 14-15.)

Furthermore, the removal by Congress of the various restrictions surrounding the term "transportation" when it enacted Section 3469 indicates that Congress intended to subject to the tax in the case of persons movements not covered by Section 3475. For example, Section 500 of the Revenue Act of 1917, c. 63, 40 Stat. 300, and Section 500 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the original provisions enacting a transportation tax levied, the tax upon—

> the transportation of persons by rail or water, or by any form of mechanical motor power on a regular established line when in competition with carriers

> by rail or water, from one point in the United States to another or to any point in Canada or Mexico, * * *.

The provisions levying a tax upon the transportation of property similarly restricted the term "transportation" so as to require that the person in question be engaged in competition with carriers as well as "engaged in the business of transporting parcels or packages by express over regular routes between fixed terminals, * * *." However, when Congress in 1941 added Section 3469 to the Internal Revenue Code of 1939, the statute here involved, it did not reintroduce the previously existing limitations of the 1917 and 1918 acts for the transportation of persons, but instead applied the tax broadly to cover "the transportation, on or after such effective date, of persons by rail, motor vehicle, water or air, within or without the United States, * * *." On the other hand, when the tax on property was reenacted by Section 620 of the Revenue Act of 1942, c. 619, 56 Stat. 798, many of the old limitations were continued in the new statute, which applied the tax only "upon the amount paid * * * for the transportation, * * * of property by rail, motor vehicle, water, or air from one point in the United States to another" and "only to amounts paid to a person engaged in the business of transporting property for hire, * * *." Consequently it is clear that the scope of the term "transportation" as it applied to persons in Section 3469 was expanded beyond the scope contained in the earlier cases and the earlier taxing statutes.

That Congress *itself* considered that it had applied the tax on persons broadly also seems apparent from the language of the report of the Senate Committee on Fi-

nance (S. Rep. No. 781, 82d Cong., 1st Sess., p. 108 (1951-2 Cum. Bull. 458, 535)) wherein, commenting upon the 1951 amendment of Section 3469(a) to exempt from the tax "amounts paid for transportation by boat for the purpose of fishing from such boat" the Committee stated its understanding that—

> Under present law amounts paid for transportation in boats where the transportation takes place for the sole purpose of fishing from the boat have been held to be taxable under these sections.

Nor is there any merit to taxpayer's contention (Br. 14) that the purpose of the tax was limited "to reduce the burden on transportation facilities which were used to convey through continual use large numbers of persons" and that "Congress was not concerned about isolated payments for flights for such specialized reasons." In the first place, taxpayer's contention overlooks the factor that if Congress had intended to restrict the tax on persons to scheduled movements by rail, air, etc., then Congress easily could have retained the former restrictions appearing in the 1917 and 1918 statutes, particularly since similar restrictions were retained in Section 3475. Secondly, even under taxpayer's interpretation, the tax would apply to charter flights of regulated air common carriers, which taxpayer concedes Mantz to be. (Br. 4.) Thirdly, the legislative history of the enactment of Section 3469, *i. e.,* to discourage wartime travel, to make these facilities available for defense purposes and *to conserve the nation's stock of gasoline,* would necessarily apply to the flights involved in this case. (See Govt's. Br. 16, fn. 4.) In any event, although the reasons which prompted the enactment of these transportation taxes have since disappeared, their continuation by Congress

indicates a present purpose to obtain revenue, which obviates any reason to restrict the term's meaning in the manner sought by taxpayer.

3. Taxpayer's contention (Br. 13-14) that Section 130.54(f) of Treasury Regulations 42 (1942 ed.) exempts the movements of circus or show trains, and that the Government should apply this exemption to the movements of this case, is without foundation. In the first place, this provision does not exempt circus and show trains from all taxes, but subjects them, instead, to the tax on transportation of property. See, Treasury Regulations 113 (1943 ed.) Section 143.14(a). Although both persons and property are transported in circus and show trains, it has been recognized by the railroads and circuses that these movements involve special situations, in that at the time the contracts are entered into and the rates are fixed, neither party knows how many laborers or performers will be carried. Since no method has been found to allocate the transportation charges between the persons and property transported, and since the contract was entered into primarily to haul circus equipment, regardless of the number of persons carried, the entire contract has been considered to relate to the transportation of property. See, Section 130.54 of Treasury Regulations 42, which holds that the tax on persons shall not apply to the transfer of freight where a person accompanies the freight, but that such movement shall be taxed entirely as the transportation of property. See also, Rule 8 of Railway Accounting Rules, 1952, published by the Accounting Division, Association of American Railroads. Since the movements in this case clearly involve the carriage of persons and are not even remotely analogous to

the movements of circus or show trains, taxpayer's attempt to utilize Section 130.54(f) to exempt the movements herein from *all* taxes should not be permitted.

4. Taxpayer's contention (Br. 6-7) that this Court should not take judicial notice that a tariff has been filed by Mantz in accordance with regulations of the Civil Aeronautics Board is mistaken, since an appellate court may take judicial notice of the existence of public documents of federal agencies, such as rules, regulations, circulars, etc., which are similar to the documents involved herein, although these documents were not introduced into evidence before the lower tribunal. *Labor Board v. Atkins & Co.*, 331 U. S. 398, 406 fn. 2.

Conclusion.

For the reasons stated, it is submitted that the judgment of the District Court below is erroneous and should be reversed by this Court.

Respectfully submitted,

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